No. 83-1564

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

v.

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY MEMORANDUM FOR THE APPELLANT

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TABLE OF AUTHORITIES

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1. Appellees have mischaracterized the relationship between this case and *Ruckelshaus* v. *Monsanto Co.*, No. 83-196. In each case the lower court held that the arbitration provisions of FIFRA, § 3(c)(1)(D), 7 U.S.C. 136a(c)(1)(D), are unconstitutional and enjoined the operation of the statute. The government contends in both cases that the constitutionality of the arbitration provision is not ripe for review because neither Monsanto nor any of the parties here complains that a completed arbitration has

caused any injury[1] (83-196 Gov't Br. 44-47; 83-1564 J.S. 8-10). The only party in either case to allege that it has participated in an arbitration is Stauffer Chemical Co., an appellee here. But, as we have explained (83-1564 J.S. 9 n.5, 10 n.6), this has no bearing on ripeness because Stauffer has never challenged the outcome of that arbitration. In fact, when its opponent filed a lawsuit contesting the arbitration award, Stauffer counterclaimed for enforcement of the award. *PPG Industries, Inc.* v. *Stauffer Chemical Co.*, Civil Action No. 83-1941 (D.D.C. filed July 7, 1983).

Accordingly, the only difference between the two cases is that Monsanto concedes that the issue is not ripe, while appellees in this case do not. This Court's ruling on the ripeness question in *Monsanto*, therefore, should control here.

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[1] Contrary to appellees' representations, the lack of ripeness in *Monsanto* has nothing to do with any "concession" made by the government in this Court. Appellees state incorrectly that "[w]hen the *Monsanto* case reached this Court, EPA conceded for the first time that the FIFRA arbitration provision does not provide just compensation" (Mot. to Aff. 11 n.17). To the contrary, EPA has argued consistently that FIFRA arbitrations were not intended to provide a Fifth Amendment "just compensation" remedy. In its Memorandum in Support of Defendant's Motion for Summary Judgment and Accompanying Memorandum, *Monsanto Co.* v. *Costle*, Civil Action No. 79-0366-C(1) (E.D. Mo. filed July 16, 1980), well before the trial in that case, EPA stated (at 45): "[T]here is nothing in FIFRA or its legislative history which demonstrates that Congress intended to withdraw the Tucker Act remedy in cases such as this one. Indeed, the compensation provided under Section 3(c)(1)(D)(ii) was not even intended to be 'just compensation' in the Fifth Amendment sense." The district court in *Monsanto* thus was apprised of EPA's consistent and long-held position on this issue.

2. Appellees also argue (Mot. to Aff. 18-20) that their improper delegation of legislative authority claim, which was not adjudicated below, would sustain the injunction and was not presented in *Monsanto*. Both contentions are in error. Appellees claim that Congress failed to provide standards for measuring the compensation due under the statute. The district court in *Monsanto* accepted this contention and made it the basis for a holding that the statute was unconstitutionally vague (83-196 J.S. App. 34a). The government's brief fully refuted this argument (83-196 Gov't Br. 48), by showing that the legislative history evidences Congress's awareness and confirmation of the pre-existing standard—the recovery of an equitable share of the data development costs—for the statutorily-required compensation. This standard is sufficiently clear to defeat the Article I claim presented here.

3. Finally, appellees' arguments against severability of the limitation on judicial review are insubstantial. Indeed, the legislative history cited by appellees (Mot. to Aff. 21-23) shows that Congress's primary purpose in revamping the compensation procedures was to relieve EPA of the job of making compensation determinations because this task was outside the agency's traditional expertise. To achieve this aim, Congress chose a more suitable vehicle—commercial arbitration. Quite obviously, the limitation on judicial review is not central to the purpose behind the amended statute. Moreover, there is no indication that Congress, had it suspected any Article III infirmity, would have eliminated the entire scheme rather than permit greater judicial review.

FIFRA's severability provision, 7 U.S.C. 136x, plainly applies to the limitation on judicial review.[3]

Therefore, even if there were merit to appellees' Article III claims, any constitutional defect would be fully cured by striking the limitation on judicial review. In that event, appellees would retain a federal cause of action to review an arbitration award since the validity of an award is a federal question over which a district court has subject matter jurisdiction. 28 U.S.C. 1331. See *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963). See also *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18-19 (1979).

For these reasons and those stated in the Jurisdictional Statement, this case should be disposed of in accordance with the decision in *Ruckelshaus* v. *Monsanto Co.*, No. 83-196.

Respectfully submitted.

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Solicitor General

JUNE 1984

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[3] Appellees' reliance (Mot. to Aff. 22) on *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87 n.40 (1982), is misplaced. The Bankruptcy Act, the statute under review in *Northern Pipeline*, had no severability clause. Pub. L. No. 95-598, 92 Stat. 2549-2688.

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